**BEFORE THE WORKERS COMPENSATION APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **JAMES P. SHEARER** | ) | |
| Claimant | ) | |
| V. | ) | |
| | ) | |
| **PROMOTIONAL HEADWEAR INT'L, INC.** | ) | Docket No. 1,069,201 |
| Respondent | ) | |
| AND | ) | |
| | ) | |
| **LUMBERMENS UNDERWRITING ALLIANCE** | ) | |
| Insurance Carrier | ) | |

## ORDER

Respondent and insurance carrier (respondent), by and through J. Scott Gordon of Overland Park, request review of Administrative Law Judge Steven J. Howard's June 27, 2014 preliminary hearing Order. Derek R. Chappell of Ottawa appeared for claimant.

The record on appeal is the same as that considered by the judge and consists of the transcript of the June 24, 2014 preliminary hearing and exhibits thereto, in addition to all pleadings contained in the administrative file.

## ISSUES

On March 12, 2014, claimant told respondent he was injured moving a box on January 8, 2014. Respondent denied compensability based on lack of timely notice. Claimant then alleged a series of repetitive traumas to his right shoulder, arm and all other parts affected due to repetitive lifting and moving boxes from approximately August 2013 through and including March 19, 2014. The judge ruled the case compensable.

Respondent requests the Order be reversed. Respondent contends claimant failed to prove personal injury by accident or repetitive trauma. Further, respondent asserts claimant failed to provide timely notice of his January 8, 2014 accident.

Claimant maintains the Order should be affirmed because he proved injury by repetitive trauma. Claimant argues his initial indication that he was injured on January 8, 2014, was qualified in that he listed question marks after listing such date on the employer's report of injury. He further contends he told respondent the use of such date was arbitrary. Claimant asserts he provided timely notice of his injury by repetitive trauma.

The issues for the Board's review are:

1. did claimant prove personal injury by accident or by repetitive trauma; and

2. did claimant provide timely notice?

## FINDINGS OF FACT

Claimant, who is 54 years old, has worked 26 years for respondent. Respondent distributes blank caps (hats). Part of claimant's job was to repetitively move boxes of hats which, in his estimation, weighed 45-50 pounds. While performing such duty, claimant testified he noticed pain in his right shoulder in the fall of 2013 and such symptoms worsened with continued work. He hoped his symptoms would dissipate, but by March 2014, claimant's symptoms were sufficient enough that he decided to tell respondent.

On March 12, 2014, claimant told Diane Wilcox, respondent's controller, that he injured himself. He testified that he told Ms. Wilcox his injury was from doing his everyday job. Ms. Wilcox gave claimant a "Report of Injury/Illness" form to complete. Claimant completed this form on his own. He listed injuring his right shoulder and bicep from pulling a box down at 9:30 a.m. on "1/8/14??"[1] Claimant testified he did not have a particular date in mind, but he had to list a date. Claimant repeatedly testified he was not injured on a specific date and was uncertain when he was hurt, but he was "stuck" with January 8, 2014 as his date of injury because he wrote such date on the injury report.[2] He asserted that when he gave the form back to Ms. Wilcox, he told her the date of injury listed was arbitrary. Claimant testified:

> . . . January 8th has nothing to do with it. It's just been going on since the fall, basically. Last fall it started hurting and it's just hurt me forever and it's getting to the point where I couldn't do my work anymore.[3]

Ms. Wilcox testified the first time claimant complained about being injured at work was on March 12, 2014. She testified claimant wrote January 8, 2014 as his date of accident. Ms. Wilcox testified claimant told her he hurt his right shoulder when reaching up to get a box, which she viewed as a specific accidental injury, not a matter of him having longstanding aches and pains. She denied he ever told her he had hurt himself due to repetitive job duties. Ms. Wilcox testified she does not discuss repetitive use injuries with respondent's employees. She testified claimant probably did tell her that his use of January 8, 2014, was arbitrary, but they did not have a lengthy discussion about the issue.

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[1] P.H. Trans., Resp. Ex. B.

[2] *Id*. at 36.

[3] *Id*. at 37; see also pp. 41, 48-49.

The insurance carrier, through Mary Beth Walbruch, obtained claimant's recorded statement on March 13, 2014. Claimant told Ms. Walbruch that he was pulling a box down from a rack when he felt something in his right shoulder give. He stated such event took place "somewhere in January" and he first told respondent about it on March 12.[4]

A claims adjuster, Jeremy Sutherland, citing K.S.A. 44-520(a)(1), denied the claim in a March 14, 2014 letter to claimant.

Claimant, at respondent's request, went to U.S. Healthworks on March 18, 2014. Kelli L. Dubinsky, D.O., examined him. Dr. Dubinsky's report stated:

> The patient states that he has worked for this company for 25 years and that he sometime around January had experienced some pain in the right shoulder and upper arm and thought that this muscle strain would get better and go away and so he did not report it to the company. The patient states that he gave an arbitrary date to the company because he just went in, I [guess] a couple of days ago, and mentioned to his employer that he was having right shoulder pain from his job, although he stated that he had had this pain since January, so the company is denying this as a Work Comp injury because a claim was never made in January. The patient states that his arm got continually worse and that he brought it to the employer's attention just recently because the pain was getting worse.[5]

Dr. Dubinsky diagnosed claimant with a right shoulder sprain/strain, probably a muscle strain. She gave claimant light duty restrictions, but noted claimant's injury was "not considered to be a Work Comp injury."[6] It is unclear if Dr. Dubinsky was commenting on whether claimant's injury was due to his job duties or if the claim was not under the auspices of workers compensation for other reasons. Claimant was also given a drug screen that was negative.

Claimant went to his primary care physician, Michelle K. Viera, M.D., on March 19, 2014. Dr. Viera's report states claimant's right shoulder pain had been progressive and worsening for seven months. She noted he used his right shoulder on a daily basis in respondent's warehouse. Further, she wrote claimant specifically denied a specific traumatic event or hearing his shoulder pop. Dr. Viera diagnosed claimant with biceps tendonitis and right shoulder pain. She took claimant off work on March 19 and gave him a 10 pound lifting restriction for work. Respondent could not accommodate such restriction.

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[4] *Id.*, Resp. Ex. C at 5.

[5] *Id.*, Resp. Ex. E at 3.

[6] *Id.*, Resp. Ex. E at 5.

Claimant hired his attorney and, in a March 27, 2014 application for hearing, asserted injury by repetitive trauma from roughly August 2013 to and including March 19, 2014.

At his attorney's request, Daniel D. Zimmerman, M.D., examined claimant on April 30, 2014. Such physician opined claimant had cervical paraspinous myofascitis, right shoulder impingement syndrome, right cubital tunnel syndrome and/or right ulnar nerve entrapment, all due to his work duties. Dr. Zimmerman stated the prevailing factor in the development of such diagnoses was claimant's repetitive work. Dr. Zimmerman recommended a variety of medical treatment and suggested light duty work restrictions.

The judge's June 27, 2014 Order states, in part:

> 1. Claimant sustained an accidental injury arising out of and in the course of his employment on March 19, 2014 by a preponderance of the evidence presented. Although the record indicates Claimant had listed a different date on some documents i[t] appears there were question marks placed behind the date listed on the report and Ms. Wilcox was unable to deny Claimant's assertion of informing her of the arbitrary nature of the date selected.
>
> 2. Notice was timely provided.
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> 3. Claimant is in need of medical care and the accident alleged is the prevailing factor in the need for medical care and temporary total benefits. Accordingly, Dr. Stechschulte is authorized herein to provide medical care to Claimant for injuries to his right shoulder, right upper extremity and cervical area.
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> 4. Temporary total disability is awarded commencing with the filing of the E 3 on May 27, 2014 to be paid at the rate for preliminary hearing purposes of $480.02 per week until Claimant returns to work, reaches maximum medical improvement, or is released to any substantial gainful employment.
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> 5. Respondent/Insurance Carrier to pay cost of court reporter fee for this hearing.
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> 6. Costs herein are hereby assessed against the Respondent/Insurance Carrier, including benefits herein awarded.
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> The findings are hereby made the orders, decrees, and rulings of the Court.[7]

Thereafter, respondent filed a timely appeal.

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[7] ALJ Order at 4.

## PRINCIPLES OF LAW

K.S.A. 2013 Supp. 44-501b(c) provides:

The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2013 Supp. 44-508 provides, in pertinent part:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

(1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;

(2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;

(3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or

(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . .

(g) ‘Prevailing’ as it relates to the term ‘factor’ means the primary factor, in relation to any other factor. In determining what constitutes the ‘prevailing factor’ in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) ‘Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2013 Supp. 44-520 states:

(a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 20 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 10 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

(2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.

(3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

(b) The notice required by subsection (a) shall be waived if the employee proves that (1) The employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.

(c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

## ANALYSIS

This Board Member affirms the preliminary hearing ruling. The extremely close case comes down to credibility. The judge was in a unique position to assess witness testimony and he believed claimant's testimony over that of Ms. Wilcox. While claimant listed a specific mechanism of injury and a specific date of injury on the employer's "Report of Injury/Illness," he repeatedly testified he did not have a specific injury on a specific date. He told Ms. Wilcox and Dr. Dubinsky that he arbitrarily selected the January 8, 2014 date. Further, claimant told Dr. Viera and Dr. Zimmerman his symptoms were due to repetitive trauma. While this is a tough decision, under the facts of this case, this Board Member defers to the judge's first-hand opportunity to assess witness credibility and his assessment of compensability.

## CONCLUSIONS

Based on the current evidence, claimant proved he sustained injury by repetitive trauma and provided timely notice.

**WHEREFORE**, the undersigned Board Member affirms the June 27, 2014 preliminary hearing Order.[8]

**IT IS SO ORDERED.**

Dated this _____ day of August 2014.

_____
HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

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Honorable Steven J. Howard

[8] By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.